



POLICE DEPARTMENT

May 10, 2010

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Christian Falconi
Tax Registry No. 930121
88 Precinct
Disciplinary Case Nos. 83892/08 and 84325/08

The above-named member of the Department appeared before me on January 6, 2010 and April 7, 2010, charged with the following:

Disciplinary Case No. 83892/08

1. Said Police Officer Christian Falconi, while assigned to the 88th Precinct, while off duty, on or about or between October 13, 2006 and October 15, in Queens County, at a location known to this Department, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Police Officer did wrongfully engage in a physical altercation with a person known to this Department, in that said Police Officer did throw said person to the ground, causing injury to said person's right knee and left hand.

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

2. Said Police Officer Christian Falconi, assigned to the 88th Precinct, while off-duty, on or about December 8, 2007, in Queens County, at a location known to this Department, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Police Officer did wrongfully refuse to accept service of an order of protection.

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

3. Said Police Officer Christian Falconi, assigned to the 88th Precinct, while off-duty, on or about December 8, 2007, in Queens County, at a location known to this Department, did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer did wrongfully fail to notify the Department when he had knowledge of an order of protection issued against him, as instructed on August 15, 2007 by Sgt. Robert O'Hare.

P.G. 203-13, Page 1, Paragraph 2 – COMPLIANCE WITH ORDERS
P.G. 208-37, Page 4 – ADDITIONAL DATA - Paragraph 2 – OFFENSES AND
DOMESTIC VIOLENCE INVOLVING UNIFORMED
MEMBERS OF THE SERVICE

Disciplinary Case No. 84325/08

1. Said Police Officer Christian Falconi, assigned to the 88th Precinct, while off-duty, on or about July 13, 2008, in Queens County, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Police Officer did wrongfully consume an intoxicant to the extent that said Police Officer was unfit for duty. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

2. Said Police Officer Christian Falconi, assigned to the 88th Precinct, while off-duty, on or about July 13, 2008, in Queens County, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Police Officer did wrongfully engage in a physical altercation with Matthew Gibbs. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

The Department was represented by Lisa McFadden, Esq., Department Advocate's Office, and the Respondent was represented by Stuart London, Esq.

The Respondent, through his counsel, entered a plea of Guilty to Specification No. 1 of Disciplinary Case No. 84325/08 and has entered a plea of Not Guilty to the remaining charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

With respect to Disciplinary Case No. 83892/08 the Respondent is found Guilty of Specification No. 1, Not Guilty of Specification No. 3, and the Court recommends that Specification No. 2 be dismissed. With Respect to Disciplinary Case No. 84325/08 the

Respondent, having pled Guilty to Specification No. 1, is found Guilty of that specification. The Respondent is found Not Guilty of Specification No. 2.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Francy Zamora, Andrea Zamora, Jorge Zamora, Sergeant Robert O'Hare, Matthew Gibbs, Shirley Falconi and Sergeant Floros Efstationou as witnesses.

Francy Zamora

Francy Zamora (hereafter, "Francy") testified that she lives in Queens County and works as a senior center director for the New York City Housing Authority. She identified the Respondent as a [REDACTED] of her daughter, Andrea Zamora and testified that they married in 2003.

Francy admitted that on April 15, 2007, she made some allegations to the Department against the Respondent based on facts she heard from Andrea and she spoke to a Captain Sparks (of the 88 Precinct) in Andrea's presence. Francy testified that Andrea told her that she had spoken with the Respondent before speaking with Sparks. Because Francy had accompanied Andrea to court proceedings in November 2007, she acknowledged that her daughter got an extended order of protection effective from the date of issue, November 26, 2007, to February 29, 2008. The document, a temporary order of protection, which Andrea had received in court, was submitted as Department's Exhibit (DX) 1.

On November 30, 2007, Francy had attempted to serve the order of protection to

the Respondent at his command, the 88 Precinct, but an officer refused to take the document after looking at it and saying the document should be an original paper that contains a seal.

On December 8, 2007, Francy and Jorge Zamora, Andrea's father, went to the Respondent's parents' house to drop off the children that the Respondent and Andrea had in common. Francy was driving and her [REDACTED] Jorge, was sitting in the passenger seat. Jorge got out of the car, passed the children to the Respondent, and handed the order of protection to him. Although Francy did not observe whether or not the Respondent had read the documents, she observed that he took the papers out of the envelope, and that he said to Jorge, "Families or relatives are not eligible to serve these documents." At that moment, the Respondent's mother snatched the papers and threw it inside of the car, while a car door was open.

On cross-examination, Francy indicated that on November 26, 2007, the Respondent did not appear at the hearing for an extension of the order of protection and thus he had no knowledge that the order of protection was extended, but she did not know why the Respondent had not shown up at the hearing. She noted that there was an attorney, DeLeon, present in the courtroom on the hearing date on behalf of her daughter. Francy received the order of protection from the attorney to be served to the Respondent. Although, she had a concern about whether it would be better to hire a professional delivery person to serve the documents to the Respondent, DeLeon informed her not only that hiring a person is pricey, but also that she or Jorge can hand it to the Respondent. However, Francy had not been notified that she was required to obtain an affidavit upon completion of the service nor that she could send it by certified mail or Federal Express if

she wanted to serve it on her own.

On November 30, 2007, when Francy went to the Respondent's precinct to serve the order of protection that she had obtained on November 26, 2007, an officer told her that he would not accept it because the papers looked like an altered document. However, Francy claimed that there is an authentic dry seal on the judge's signature on the last page of the documents and she tried to show it to the officer but he walked away.

A few days later, after Francy had failed to serve the order at the Respondent's precinct, she called DeLeon and asked for an alternative option to serve. He told her to serve it at the Respondent's house, where the parties had agreed in court that the transfer of his two children would take place.

On December 8, 2007, Francy and Jorge went to the Respondent's house and Jorge handed the documents in a white envelope to the Respondent. She observed that the Respondent took the papers out of the envelope and that he said, "Families or relatives are not supposed to serve these papers." While the documents were still in his hands, his mother snatched the papers and threw it into the back seat of the car. She did not recall whether Jorge picked up the documents from the floor of the car nor if she got out of the car for further action. She testified that she then drove to her home and brought the documents back to the home. Francy admitted that the Respondent still might not have knowledge of the extension of the order protection.

Francy contacted DeLeon to notify him about her second failure to serve the order protection to the Respondent. DeLeon advised her to go to the precinct again. Although she did not recall the exact date of her second visit to the Respondent's precinct, the same officer eventually received the documents on that date.

On redirect examination, Francy testified that she observed the Respondent opening the envelope and looking at the papers, and then he made a comment that families and relatives are not supposed to serve the documents. She noted that his comment, which is subsequent to his act, indicates that he had acknowledged the contents of the documents. Although Francy considered the Respondent to be aware of the content of the documents, she kept attempting to serve the documents to him because she was aware that the extension of the order of protection must be served to the Respondent physically.

On re-cross-examination, Francy did not think that the Respondent had not been served when Jorge handed the documents to the Respondent in front of his parent's house.

Andrea Zamora¹

Andrea Zamora (hereafter, "Andrea") identified herself as an [REDACTED] of the Respondent. She testified that she was married to the Respondent in February 2003 and their marriage lasted approximately four years. They have two children, [REDACTED] [REDACTED] a s [REDACTED], and [REDACTED], a t [REDACTED].

Andrea described an altercation that occurred on or about October 16, 2006 at about 4:30 A.M. While she was sleeping in her bedroom, the Respondent, who was severely intoxicated, turned on the music loud and walked into the children's bedroom. Andrea awakened, got up, walked out of her bedroom, and asked the Respondent, "What are you doing there?" The Respondent cursed at her, pushed her down on the couch, and forced her to have intercourse with him. When she resisted, the Respondent grabbed her hair and pushed her down to the floor. She immediately stood up and tried to run away to

¹ Andrea Zamora was also referred to as "Andrea Falconi" during testimony.

the kitchen, where one entrance connects to her bedroom. Then, the Respondent lifted her whole body by grabbing her waist and throwing her onto the kitchen floor which is made of granite tiles. From the incident, she received bruises on her forehead, her fingers had been jammed against the floor, and her right knee was severely swollen. Although Andrea was about to call 911 at the moment of the incident, the Respondent threatened her by saying the cops would arrest her instead of him and take the children away from her. She did not report the incident to the police that night.

The next day, Andrea visited her doctor to examine her injuries. The doctor advised her that her right knee was not fractured after taking an x-ray. He further advised her to have ice massages for her knee and to take some [REDACTED] relieve the pain. Although she applied the medication as advised by the doctor, she suffered from the pain for about a week. Even now, she feels the pain in her right knee, in particular, when the weather consists of high humidity.

Andrea took six photographs of her injuries within 24 hours of the incident and submitted them to her attorney's office as evidence, which were accepted as DX 2a-2f. Two medical records from her doctor dated on October 17, 2006 were marked as DX 3.

Andrea stated that she had not spoken about the incident to anybody until April 2007, when she first disclosed the incident to her mother, Francy. At the beginning of April 2007, the Respondent went to the 115 Precinct to report the incident while Andrea waited in a car. The Respondent returned to the car and said they had to go to the 88 Precinct. While driving, the Respondent advised her not to say anything to his captain (Sparks), telling her that they will take away his gun and shield and "send him somewhere." She said she did not tell the truth about the incident to the captain at the 88

Precinct because she was scared.

However, Andrea testified that, about the last week of April 2007, she eventually spoke to an investigator in the Department about the incident, because she felt secure since she moved to her father's house with her children and commenced [REDACTED] [REDACTED] with an order of protection. She admitted that she went to Family Court numerous times to obtain an order of protection.

On cross-examination, Andrea testified that she had believed that she would be arrested if she called 911 on the date of incident, although she had not done anything wrong. She stated that the altercation woke up none of her neighbors nor her children, and she had neither reported the incident to police nor told her mother about the whole incident until April 2007. She admitted that even after the incident, she had stayed with the Respondent under the same roof and in the same bed until she moved to her father's house.

In early April 2007, when Andrea and the Respondent drove to the 88 Precinct, she only remembered being asked by Sparks whether the Respondent had a drinking problem. She said "No" to all of Sparks' questions. She also did not recall whether or not she was interrogated at the 88 Precinct in the Respondent's presence, or whether or not she has ever disclosed to anyone in the Department that she had lied to Sparks at the 88 Precinct.

Subsequently, Andrea testified that she spoke to Sergeant O'Hare of the Internal Affairs Bureau ("IAB"), about the Respondent's misconduct. She noted that on or about April 23, 2007, O'Hare first contacted her on the phone and set up an appointment for an in-person interview. He visited her house about twice and kept in touch with her

occasionally.

Andrea testified that while she was staying with the Respondent from October 2006 to April 2007, she never made any reports about the incident because she was “afraid of everything” even though she admitted to sleeping under the same roof and sleeping in the same bed with the Respondent during that time.

On redirect examination, Andrea noted that she had been worried about supporting herself and her children if she would have left the Respondent, since she had no job or income.

Jorge Zamora

Jorge Zamora, (hereafter, “Jorge”) testified that the Respondent is the [REDACTED] [REDACTED] of his daughter, Andrea. Jorge stated that in November 2007, Andrea divorced the Respondent, and as part of that divorce, she was issued an order of protection. According to Jorge, he attempted to serve the order for Andrea by driving to the Respondent’s residence with his [REDACTED], Francy, and handing the Respondent an envelope containing the order. It was stipulated that this attempt occurred on December 8, 2007. Jorge testified that after he handed the Respondent the envelope, he saw the Respondent open the envelope and read the order. Jorge stated that after the Respondent read the order, the Respondent told Jorge that family members were not supposed to serve the order. Then, according to Jorge, the Respondent’s mother took the envelope from the Respondent and threw it into the car where Francy was waiting in the driver’s seat.

On cross-examination, Jorge explained that he and his [REDACTED], Francy, drove

to the Respondent's residence for the purpose of dropping off the Respondent's children. According to Jorge, his [REDACTED], who was in the driver's seat, handed him the envelope and told him the order of protection was in it. Jorge clarified that when they drove up to the residence, he got out of the passenger side and left the car door open because he was standing close to the sidewalk. Jorge could not recall whether the envelope handed to him had any writing on it or whether it was an envelope from the court system. Jorge stated that only his former wife was in court when the order of protection was extended. Jorge reaffirmed that he handed the Respondent the envelope and saw the Respondent's mother take the envelope and throw it back into vehicle. However, Jorge could not remember whether the envelope was separate from the order of protection when it was thrown back into the car. Jorge testified that when he spoke with the Assistant Department Advocate about the case, his former wife, Francy, was in the same room.

Sergeant Robert O'Hare

Sergeant Robert O'Hare, (hereafter, "O'Hare"), employed with the New York Police Department since July 1995 and assigned to the Brooklyn North Investigations Unit since October 2002, explained that his general duties include conducting internal investigations regarding allegations of domestic disputes, firearm discharges and "anything deemed fit by a duty captain warranting an internal investigation." O'Hare affirmed that in May 2007, he was assigned to an investigation involving the Respondent.

Regarding how the allegations were initially reported, O'Hare testified that around April 24, 2007, a phone call was made to the Department which was ultimately

forwarded to the Chief of Internal Affairs and to O'Hare's office. According to O'Hare, an investigation commenced at that time and ran until approximately January or February 2008, where it was then presented to the Department Advocate's office. O'Hare explained that from the time the Department received the initial complaint in April 2007 until the case was closed, there were approximately ten additional IAB log numbers involved with the investigation into the Respondent.

O'Hare testified that during the course of the investigation, he spoke with or attempted to speak with Andrea on at least six occasions, and that on May 21, 2007, he conducted an in-person interview with her. O'Hare stated that prior to the initial call out investigation, commenced on April 24, 2009, there was at least one other interview of Andrea, which was conducted by Sparks on April 15, 2007 as part of a duty captain investigation. According to O'Hare, as part of his investigation, he tracked any orders of protection that were issued on behalf of Andrea and found an order of protection that has been extended multiple times.

O'Hare testified that on August 15, 2007, he interviewed the Respondent and discussed with him a member's responsibility when a [REDACTED] order of protection is issued. O'Hare also stated that he instructed the Respondent of his responsibility to notify his commanding officer if he became aware that an order of protection had been issued against him. When shown DX 1, O'Hare recognized the document as an order of protection that, based upon his investigation, was originally attempted to be served at the Respondent's command on November 30, 2007 and was the order the "complaining witnesses" attempted to serve on Respondent on December 8, 2007. Furthermore, O'Hare affirmed it was the same order that he became aware of on

January 4, 2008, and that he ultimately served on the Respondent on January 7, 2008.

O'Hare explained that he specifically recognized this particular order because he recalled a question as to its authenticity due to the judge's notation of "extended 2/29/08" on the bottom right-hand corner of document. O'Hare testified that he conducted an independent NYSPIN² inquiry and ascertained that the order was in fact valid.

O'Hare recalled that a 49³ was generated on April 25, 2007 regarding an interview of Andrea by his commanding officer, Captain Trainor. O'Hare did not recall whether Andrea, in her interview with Trainor, referenced an incident where she was required to get medical attention. However, O'Hare stated that Andrea referenced that incident and provided some documentation to him during his interview of her.

On cross-examination, O'Hare testified that Trainor's interview with Andrea was conducted over the phone since she refused an in-person interview. However, O'Hare stated that his subsequent interview of Andrea was in-person.

O'Hare explained that the Respondent's case appeared in [REDACTED] first, before Andrea's, but the judge decided to combine the cases. O'Hare testified that the Department knew there was an order of protection against the Respondent as of May 10, 2007 and that, for the most part, the order of protection was extended from that time until the case ended. O'Hare stated that he was never in court when the orders were extended. According to O'Hare, Andrea, without giving any specific reason, allowed the order of protection to lapse in September 2007, but the order was re-issued in court on October 18, 2007, and subsequently extended on November 26, 2007.

O'Hare testified that he did not know whether the Respondent was ever served

² New York Statewide Police Information Network.

³ Department memorandum.

with the October 2007 order of protection. O'Hare also explained that because he was not present at the Respondent's parents' house on December 8, 2007, he did not know exactly what happened outside of the home, other than the information that was furnished to him. O'Hare stated that he was not aware as to whether the order of protection extended on November 26, 2007 was issued in open court or with the Respondent present. Also, O'Hare stated that he never went to [REDACTED] to speak with the clerk or do any investigation with respect to the judge who extended the order. However, O'Hare clarified that the extension was actually issued in the Supreme Court of Queens County and that the "ex parte" box was checked off on the order. O'Hare further clarified that he never went to the Supreme Court in Queens County to inquire into how the ex parte order was issued or the circumstances under which the judge signed the order. According to O'Hare, he confirmed that the order was valid based upon the NYSPIN inquiry he conducted on January 4, 2008.

O'Hare stated that everything came to his attention regarding the extended order of protection on January 4, 2008 when he received the IAB log. Ultimately, according to O'Hare, he served the order on the Respondent on January 7, 2008 while the Respondent was present in his office. O'Hare testified that the Respondent, when served on January 7, 2008, indicated to O'Hare that he had not received the order prior to that day, he did not know what the Zamora family had attempted to serve him with, and that his lawyer told him not to accept any paperwork from the family.

With respect to the 49 prepared by Trainor, O'Hare recalled that the 49 indicated that Andrea had not been truthful in her initial interview with Sparks on April 15, 2007 since she did not tell him the full story of her problems with the Respondent and she

denied in substance the allegations reported by her mother. O'Hare confirmed that it would be fair to say that Andrea's mother, Francy, was the "prime mover" in making the allegations against the Respondent prior to Andrea coming forward and confirming them. O'Hare reiterated that on or about April 24, 2007, Andrea spoke with Trainor via telephone about the allegations and on May 21, 2007, she met with O'Hare in person.

On redirect, O'Hare testified that prior to his awareness of the November 26, 2007 extended order of protection, DX 1, he still had an open case on the Respondent. O'Hare stated that the information on the extended order of protection essentially generated a new investigation and that he ended up "breaking it into three separate case folders." O'Hare stated that the NYSPIN, besides motor vehicle inquiries, can be used to conduct most case inquiries regarding orders of protection that get entered into the system by someone within the court administration.

O'Hare explained that the investigation by Trainor on April 24, 2007 was initiated by a phone call generated by a former deputy commissioner, Yoland Jiminez, who spoke to the Domestic Violence Unit. The Domestic Violence Unit notified IAB, who in turn contacted Lieutenant Gauf in O'Hare's office. O'Hare testified that the initial complaint came from Andrea's mother, and made its way through the "channels" to Trainor. O'Hare stated that Trainor initially reached out to Francy in order to get in contact with Andrea, but Francy gave Trainor a hard time. O'Hare believed that the 49 states that Andrea was not available at that time for an in-person interview with Trainor, and that Francy would not provide Andrea's contact information. O'Hare recalled that Andrea had informed Trainor about a specific incident where she received some sort of injury. According to O'Hare, Andrea indicated to Trainor that she lied to Sparks because the

Respondent told her not to cooperate with the captain since the Respondent was concerned about his children and his employment.

On re-cross-examination, O'Hare testified that Francy was the initiator of the complaints against the Respondent and that she followed several avenues to file complaints, including writing letters to different people after her failed attempt to serve the order at the precinct. Furthermore, according to O'Hare, Francy was very involved in the case and even made allegations against other officers for being rude, disrespectful, and racist toward her. O'Hare clarified that while it was Francy who refused to provide Andrea's contact information for an interview, it was Andrea who ultimately refused an in-person interview with Trainor once they were able to contact her by phone.

Matthew Gibbs

Gibbs, currently employed as a sales associate at Home Depot, was working as a security officer with Atlas Security in July of 2008. He previously worked for another company where he completed security training and earned a certificate. On the evening of July 12 and early morning hours of July 13, 2008, Gibbs was working the 10 p.m. to 4 a.m. shift at the Blue Lounge nightclub on Roosevelt Avenue in Queens. He was assigned to the basement area at the back of the nightclub adjacent to the bathrooms. That night, the club was hosting a "sweet sixteen" party and there were between 200 to 300 people present, both adults and minors.

At approximately 3:10 a.m. the lights were turned on and the patrons were asked to leave. It was at this time that Gibbs first noticed the Respondent, whom he had never met or seen before, and believed that he was intoxicated. Gibbs had no knowledge that

the Respondent was a police officer at this time and only found out after the altercation.

Gibbs stated that he observed the Respondent trying to dance with a female in an orange dress and that the Respondent proceeded to follow the female into the women's bathroom. The women's restroom is on the left side of a hallway towards the back of the club and there is a staircase with approximately five steps leading up to the stalls and sinks at its entrance. Gibbs saw the Respondent on these steps with his pants unzipped and belt buckle undone and asked him to come down.

Gibbs repeated his command for the Respondent to come down twice and each time he refused to comply. Gibbs stated that he felt that the Respondent, "basically he said fuck you, mind your business more or less" and he continued to walk up the steps. Gibbs then approached the Respondent on the steps and attempted to grab him, at which point the Respondent slapped Gibbs' hand, pushed him with his chest, and then proceeded to raise his fist to mid-chest level. The Respondent stated to Gibbs something to the effect of "what are you going to do?"

At this point, both men were standing at the top of the stairs leading into the women's restroom. The Respondent had his back to the stairs and Gibbs was further into the room. Gibbs claimed that he felt threatened by the Respondent's statement and actions, so he acted first and swung at the Respondent with a closed fist. The blow landed on the Respondent's face near his nose and the momentum caused the Respondent to fall down the stairs. The Respondent began to bleed from his nose and Gibbs went into the men's restroom to get tissues for the Respondent.

The police were called and responded to the scene. Gibbs made a statement to the police and admitted to striking the Respondent and after reviewing a surveillance tape; he

was arrested and charged with assault. Gibbs eventually pled guilty to misdemeanor disorderly conduct and the assault charges were dropped. Gibbs testified that he did not have any brass knuckles or other weapons on him that night. He also testified that this was the first time that he had ever been arrested and that he had not been arrested since.

The surveillance tape, DX 7, was then played for the court and Gibbs narrated the sequence of events as seen on the tape. The tape shows the hallway outside of the bathrooms and shows the Respondent's [REDACTED] reacting after her husband fell down the stairs. It was at this point that his [REDACTED] became animated and yelled that her husband was a cop and argued with Gibbs over why he punched him.

On cross-examination, Gibbs testified that no equipment was provided to him to protect himself at work. He stated that the Blue Lounge has two floors and the incident with the Respondent took place in the basement. At that time, Gibbs was the only security officer in the basement as the others had all been sent upstairs when the lights were turned on.

Gibbs hit the Respondent with his right fist and got a cut on his middle knuckle as a result of the blow. The surveillance video does not show the physical altercation between the two men other than the Respondent falling down the stairs. Gibbs stated that his path to exit the bathroom was not blocked by the Respondent but that he did not want to leave to get back-up since he believed there to be other female patrons in the restroom. However, Gibbs did not look into the stalls to verify this. The video shows that the woman in the orange dress had already walked out of the restroom before the incident and Gibbs further testified that he did not know that she was the Respondent's [REDACTED]

[REDACTED]

Gibbs stated that he was not injured by the Respondent but that he was afraid after the Respondent put his hands up and pushed him. He further testified that the Respondent did not appear to be drunk when he punched him, but that he was aggressive. Gibbs stated that he pled guilty to disorderly conduct although he did not believe that he was acting disorderly. Gibbs was fired by the security company after this incident.

On redirect examination, Gibbs testified that he felt that he could not leave the restroom because it was his job to keep the female patrons safe. He also claimed that based on how the Respondent was standing, the Respondent could have swung his fists at him and that he (Gibbs) swung first because he felt threatened.

On re-cross examination, Gibbs stated that it was falling down the steps, and not the punch, that knocked the Respondent out.

The Respondent's Case

The Respondent called Shirley Falconi, and Sergeant Floros Efstratiou. The Respondent also testified on his own behalf.

Shirley Falconi⁴

Shirley Falconi, (hereafter, "Shirley"), testified that she has been married to the Respondent for five months. On July 13, 2008 at about 10 P.M., her niece's birthday party was taking place in a rental space in Jackson Heights, Queens, and she took the Respondent to that event with her. They had three vodkas with grape juice. Before leaving the place, they agreed to stop by the bathroom, which was located in the basement, and the Respondent mistakenly walked into the ladies room. A security guard

⁴ Shirley Falconi was also referred to as "Shirley Sanchez" during testimony.

yelled at the Respondent, "You shouldn't go in there." Although the Respondent stepped back, the security guard tried to touch the Respondent's shoulder in order to get him out of the ladies room. The Respondent simultaneously raised his hands up and said, "I understand so don't touch me." At that moment, the security guard punched the Respondent in the face and he fell down on the floor. Shirley testified that the Respondent did not push the security guard nor did he move toward the security guard with a clenched fist in an aggressive way.

Shirley stated that she immediately called 911 and complained to the security guard about what he had just done to the Respondent. She noted that the security guard disappeared for a while, but when the police came, he showed up again, and then she identified the security guard as the one who assaulted the Respondent and reported what had just happened. She believed that a manager of the place had persuaded him to come out to confess.

On cross examination, Shirley testified that she and the Respondent walked down to the bathroom together and both approached the ladies room, which is clearly marked as the ladies room, and the Respondent actually entered the ladies room. She admitted that when the security guard first approached the Respondent, he did not immediately strike him but told him to exit the ladies room. She did not observe the security guard with any kind of a weapon nor see him put on brass knuckles. She described that she had no difficulties finding and identifying the security guard when the police arrived at the scene. She noted that she was not intoxicated that night.

Sergeant Floros Efstratiou

Efstratiou testified that he has worked in the Patrol Bureau Queens North Investigations Unit for about 18 months. He stated that on July 13, 2008 at 5:30 a.m., he received an assignment to collect all of the arrest paperwork regarding Gibbs as part of an investigation. That night, Gibbs had been arrested for assault third degree and harassment. He noted that a weapon was used by Gibbs, which was mentioned in the description of the assault of the Respondent in either the arrest report or the complaint report. In an aided report, there was a description of what occurred but no mention of a weapon used. Efstratiou testified that he did not interview the Respondent that night because it was reported that he was unfit for duty and Efstratiou felt that it would be unfair to the Respondent if he was subjected to an interview while he was in the hospital. However, when he interacted with the Respondent, he did not make any determination as to whether he was unfit.

On cross examination, Efstratiou testified that he is not the one preparing any paperwork with respect to this case.

The Respondent

The Respondent joined the Department on July 1, 2002 and was initially assigned to the 73 Precinct, where he served for a year and a half. He was then transferred to the 88 Precinct where he has been assigned for the past six years. The Respondent stated that his most recent assignment at the 88 Precinct included anti-crime tours from 5 p.m. until 1 a.m., as well as "crime analysis" which includes updating databases and other paperwork. As a result of the charges brought against the Respondent in this matter, he

has been placed on modified duty.

Disciplinary Case No. 84325/08

The Respondent testified that on July 13, 2008, he attended a birthday party at the Blue Lounge, a bar and party venue on Roosevelt Avenue in Queens. The party was thrown in honor of the birthday of the niece of his then-girlfriend, Shirley, and he and Shirley attended the party together. Approximately 100 guests attended the party which was held in the basement of the Blue Lounge. The Respondent and Shirley arrived at the party at about 9:35 p.m. and during the course of the night he had three drinks consisting of Grey Goose vodka and cranberry juice. The Respondent stated that he did not have anything to drink prior to arriving at the party and that as a result of having these drinks, the Respondent acknowledged that he was unfit for duty. The Respondent is pleading guilty to that specification.

At approximately 3:00 a.m., the Respondent was assaulted at the Blue Lounge while attempting to use the bathroom. The bathrooms at the Blue Lounge are located at the back of the basement area. The men's bathroom is located directly across the hall from the women's bathroom. At approximately 3:00 a.m., the D.J. at the party announced the last dance of the night at which point the Respondent and Shirley were holding hands as they proceeded towards the bathrooms. The Respondent stated that at this point they were approached by Shirley's [REDACTED] who told them to stay at the party and dance. The Respondent then let go of Shirley's hand and proceeded towards the bathrooms, intending to leave the party after using the bathroom.

The Respondent walked up the four steps leading towards the bathroom and heard

a voice telling him that he was going the wrong way, and that he was entering the women's bathroom. The four steps lead up to a small foyer area about three feet long before leading into the bathroom. The Respondent stated that this person told him, "[Y]o, you are going the wrong way, you are going towards the woman's room (*sic*)."

The Respondent testified that at this point he realized that he had made a mistake and was walking up the stairs to the women's bathroom. The man who had told him that he was going the wrong way then came up the stairs and put his hands on the Respondent's shoulders. The Respondent stated that he put his hands up with his palms out and told the man that he understood, not to touch him, and that there was no need to get aggressive. The Respondent put a hand on the man's shoulder and took a step back. At this point, the man "put his hands down and lunged towards me with a closed right fist going towards my nose."

The Respondent stated that prior to the man coming at him, he noticed golden brass knuckles on his right hand. The man's punch made contact with the Respondent's face just below his left eye which caused him to fall back down the steps. At that point, the Respondent lost consciousness for an indeterminate amount of time. The next thing that the Respondent remembered was being approached by two EMS workers and being asked some questions. The Respondent stated that he felt confused by the impact and that there was blood on his hands and his clothes.

The workers helped the Respondent walk to an ambulance which transported him to Elmhurst Hospital. At the hospital, a doctor examined the Respondent's injuries and told him that he agreed that the injury was caused by brass knuckles. The Respondent required 11 stitches to close the wound below his left eye and the Court noted the scar

that is still visible on the Respondent's face. The Respondent testified that prior to this incident, he had never met the man who punched him and was not aware at that time that he was a bouncer. Following this incident, the man was arrested and the Respondent cooperated with the Queens County District Attorney's Office in their investigation.

Disciplinary Case No. 83892/08 Specification Nos. 2 and 3

On December 8, 2007, the Respondent had a custody arrangement with his [REDACTED] [REDACTED], Andrea Zamora, with respect to visitation of their children. On that date at approximately 12:00 p.m., the Respondent was picking up his children from his [REDACTED]'s parents, Jorge and Francy Zamora, in front of his mother's house in [REDACTED] New York. At that time, his daughter was a [REDACTED] old and his son was [REDACTED] old. The court had specifically designated this location to be the place where the children would be exchanged.

On that date, the Respondent was present at his mother's home with his mother and sister when his [REDACTED]'s parents came to deliver the children. The Respondent's [REDACTED] [REDACTED] was not present. While handing the Respondent his daughter, his [REDACTED] also placed a closed white envelope into his hands. Neither of the Zamoras said anything to the Respondent at this time. Once the Respondent was holding the envelope, the Respondent's mother grabbed it and threw it into the Zamora's car. The Respondent then advised the Zamoras that his lawyer had instructed him that any written or verbal message should be directed to his attorney, and Francy said "okay." At no point during this exchange did Francy exit the vehicle.

Prior to December 8, 2007, the Respondent had last been in [REDACTED] on

November 27, 2007, and to his knowledge, an order of protection was not extended at that time. Nor did the Court say anything about an order of protection. The next time that the Respondent received an order of protection was on January 7, 2008, when O'Hare from the Brooklyn North Investigations Unit served him with the order. On that date, the Respondent received a phone call from O'Hare telling him to come to the 90 Precinct, which he did. At the precinct, the Respondent was informed that he was being served with an order of protection on behalf of his [REDACTED]

On August 15, 2007, O'Hare had indicated to the Respondent that if he were served with an order of protection, that he should notify him immediately. The Respondent stated that he complied with this directive and that there were no orders of protection that were served after August 15, 2007, that he failed to tell him about. The first order of protection that the Respondent became aware of was the one handed to him on January 7, 2008, by O'Hare.

Disciplinary Case No. 83892/08 Specification No. 1

The Respondent testified that at no time between October 13, 2006 and October 16, 2006, did he throw his [REDACTED] to the ground causing injury to her right knee and left hand. During these dates, the Respondent was assigned to the Anti-Crime Unit and had steady tours of duty from 5:00 p.m. until 1:35 a.m. It was his routine to get home around 2:30 a.m. and to watch TV and fall asleep. The Respondent had no independent recollection of these dates other than his usual routine. The Respondent stated that he had no recollection of assaulting his [REDACTED] and causing injury to her right knee or left hand.

On cross-examination, the Respondent stated that he pled guilty to being unfit for duty because he had alcohol in his system, and not because he was "highly intoxicated." The Respondent stated he did not see the brass knuckles on the bouncer's person at any time prior to his raising his fist to punch the Respondent. The Respondent stated that he was aware that the bouncer was never charged with anything involved with brass knuckles, that he never pled guilty to anything involving brass knuckles, and that no weapons were found on him by the police.

The Respondent stated that during the night of July 13, 2008, he had been to the men's bathroom prior to 3:00 a.m. However, the Respondent stated that at that time, he did not recall seeing anything to indicate that the stairs he was walking up led to the women's bathroom and not to the men's. The Respondent testified that an unfit for duty report was prepared after this incident, but he did not recall at what time it was prepared. The Respondent had a chance to review the report and it showed that Captain White indicated that the Respondent was passed out drunk at 5:30 a.m. on the day of the incident. He is also aware that White indicated that he was unresponsive, sleeping, and had the smell of alcohol on his breath.

At this time, a discussion was held as to whether the unfit for duty reports that were filled out by White and also by Lieutenant Kapur should be admitted into evidence. The reports were admitted subject to the testimony of Kapur and White (DX 6 and 7, respectively). The Court also ruled that the Respondent's medical records from the hospital were admitted into evidence (DX 8).

The Respondent testified that on December 8, 2007, he never saw the contents of the envelope handed to him by Jorge Zamora, nor was he ever told that they were

attempting to serve him with an order of protection. The Respondent never stated to the Zamoras that an order of protection needed to be given to a precinct in order to be served, or that a family member could not serve an order of protection. At the time that the envelope was handed to him, the Respondent's mother was not upset.

The Respondent stated that there was no court date on November 19, 2007, and that he was not in court on that date. He was not aware that his [REDACTED] had gone to court on that date to get an order of protection extended. In the past, the Respondent's [REDACTED] had previously gone to court to get the orders extended. The Respondent was aware that there had been a previous court date where an order of protection had been extended until November 26, 2007.

The Respondent stated that he never had any idea about what the contents of the envelope were and that he did not know whether they were related to the case. The Respondent testified that he had no idea what was in the envelope and that it might have been something related to medical expenses, school expenses, or possibly a letter of apology. On December 8, 2007, the Respondent was aware that if he had knowledge of an order of protection being issued against him that he needed to inform the Department of this.

During the time period between October 13, 2006 and October 16, 2006, the Respondent did not have the practice of going out to drink with colleagues at the end of his tour. The Respondent stated that he did not go out drinking during this time period. The Respondent stated that he recalls being questioned by O'Hare about this incident and that he did not have any problems with his [REDACTED] and did not know why she made this allegation. The Respondent stated that he did not recall his [REDACTED] having an injury

during this time period or her telling him that she had gone to the doctor.

The Respondent stated that [REDACTED] was the family physician and that both he and his [REDACTED] saw him. The Respondent was shown pictures and he stated that he did not recall seeing any injuries like those depicted in the pictures (DX 2a 2f) during that time. Prior to the filing of [REDACTED], the Respondent and his [REDACTED] were having [REDACTED]. However, the Respondent stated that he was not aware of any allegations made against him at that point in time.

On April 15, 2007, the Respondent stated that he recalled being interviewed by Sparks and that he and his [REDACTED] went to the precinct together on that date. They were going to the precinct to discuss allegations made against the Respondent by his [REDACTED] involving his [REDACTED] and their kids. The Respondent stated that he did not have a discussion with his [REDACTED] about what would happen at the precinct and that he was not concerned about the incident having a negative effect on his career.

The Respondent stated that he did not threaten his [REDACTED], tell her that she would get into trouble if she made allegations against him, or threaten that their children would be taken away if she made allegations. He did not know what the allegations were about and was not concerned while they were driving to the precinct. The Respondent stated that he never made threats to his [REDACTED] during the period between October 13, 2006 and October 16, 2006. In his GO-15, the Respondent recalled stating that his [REDACTED] [REDACTED] had always been in between his marriage. Prior to April 15, 2007, the Respondent was not aware of either of his [REDACTED] making allegations against him.

The Respondent testified that when he fell down the stairs on July 13, 2008, it was not possible that he became unconscious due to his level of intoxication.

On re-direct examination, the Respondent stated that he was not concerned when he was driving to the precinct with his [REDACTED] because it was her mother making the complaints, and not her, and that she was there to show her support. The Respondent stated that when he saw the doctor at [REDACTED], he told him that he had been hit with brass knuckles.

Upon further questioning by the Court, the Respondent stated that his mother had taken the envelope from his hand and thrown it into the Zamora's car, and that he never opened it or saw the contents of it.

FINDINGS AND ANALYSIS

In Disciplinary Case No. 84325/08, the Respondent is charged with two specifications. The first specification charges the Respondent with "wrongfully consuming an intoxicant to the extent that said Police Officer was unfit for duty." The Respondent has pled guilty and is therefore found Guilty of this specification.

The second specification alleges that the Respondent "did wrongfully engage in a physical altercation with Matthew Gibbs."

On the date in question, July 13, 2008, the Respondent was at a family celebration with his girlfriend at a location in the basement of a lounge in Queens. The Respondent acknowledges that he arrived at about 9:30 p.m. The altercation took place at closing time, approximately 3:00 a.m. As noted above, the Respondent admitted that he was unfit for duty but claims he only drank three alcoholic beverages in that period of time.

It is not disputed that the confrontation between the Respondent and Gibbs, a security guard at the lounge, occurred when the Respondent mistakenly went toward the

ladies' room rather than the men's room. Gibbs attempted to stop him.

It is also undisputed that Gibbs punched the Respondent who fell down a small flight of approximately four steps. The Respondent was taken to the hospital and Gibbs was arrested for assault. He later pled guilty to Disorderly Conduct in Criminal Court.

Gibbs testified and explained his conduct. He expressed his concern that the Respondent was headed into the ladies room. He noted that the Respondent ignored his verbal commands to stop and took a threatening stance. At that point Gibbs said that he punched the Respondent in the face. While there was some physical contact before the punch, that was not what prompted Gibbs to act. What prompted him to act was, he said, the fact that the Respondent balled his fists and looked to Gibbs like he was going to hit him.

The problem with this specification is that the Respondent is accused of having engaged in a physical altercation with Gibbs. But Gibbs, by his own testimony admitted that he hit the Respondent before the Respondent had a chance to take physically aggressive action.

Gibbs could have gone to trial and attempted to interpose a defense of justification (see Penal Law 135.15) but he chose not to do that and entered a plea of guilty to a lesser offense. That alone should be sufficient, under the circumstances, to reject his version of events. Further, his own testimony on cross-examination, tended to indicate that Gibbs could have taken other less drastic action.

But even if Gibbs had been successful with a justification defense, his claim would have been based on his belief that aggressive conduct by the Respondent was "imminent." No matter how you look at it the Respondent did not engage in a physical

altercation with Gibbs. At most, his behavior was threatening, and that is not what is charged.

The Respondent is found Not Guilty of this specification.

In Disciplinary Case No. 83892/08, the Respondent is charged with three specifications. The first specification alleges that the Respondent engaged in a physical altercation with Andrea Zamora, in that the Respondent "did throw said person (Andrea Zamora) to the ground, causing injury to [her] right knee and left hand."

Andrea Zamora, the Respondent's █ at the time, testified credibly that the Respondent, while intoxicated, engaged in a physical confrontation with her in which he pushed her causing her to sustain injury to her knee and hand. The fact that she did not report this event until many months later was explained to the satisfaction of the Court in that she said she was afraid and indeed only came forward with the facts about what happened when she was no longer living with the Respondent.

Andrea Zamora's testimony does not stand alone on this issue. She provided photographs she said she took of the injuries. These photographs provide some measure of corroboration but they are limited because the source of their veracity as the date they were taken comes from Andrea Zamora herself.

More probative are the medical records of her visit to the doctor. No challenge was made to the veracity of those records and both the injury and date of treatment corroborate her claims.

The Department has met its burden of proof and the Respondent is found Guilty of Specification No. 1.

Specification No. 2 alleges that the Respondent “wrongfully refused to accept service of an order of protection.” While this sounds like some kind of violation this Court is hard pressed to understand what this specification means.

Service of legal process is not measured by the will or intent of the person receiving the service if that were the case it would be a very rare event for legal process to be served. Proper service is measured by compliance with the legal rules set forth for the service of legal process, and are binding, whether or not the person being served willingly accepts service (see N.Y. Civ. Pr. Law and Rules § 308 and related case law). Consequently the whole notion of someone “refusing to accept process” makes no sense.⁵

There is a second problem with this specification. There is no Patrol Guide section or any other rule that provides that a police officer, or any member of this Department, is deemed to have given up his or her right to be served with legal process according to law, nor does there seem to be any public policy to justify the denial of this basic right. On the other hand, if members of the service were required accept improper service, that could result in some very troubling situations in which improper individuals, such as minor children, might engage in service of process. Such a policy might also subject members of the service to other inappropriate or ineffective methods of service. As such, it might expose members of the Department to nefarious practices of non-service commonly referred to as “sewer service.” For all of the above reasons, Specification No. 2 should be dismissed.

Specification No. 3 alleges that the Respondent “wrongfully failed to notify the Department when he had knowledge of an order of protection issued against him as

⁵ This is to be distinguished from someone trying to avoid or evade personal service of process. The rules for service of process address that problem by offering alternative methods of service (see CPLR § 308 subdivisions 2, 4 and 5).

instructed by Sergeant Robert O'Hare." The specification also cites to Patrol Guide § 208-37.

The operative language of that section of the Patrol Guide reads as follows:

In all circumstances, no matter where issued, when a member of the service (uniform or civilian) becomes aware that he or she is the respondent/defendant on an Order of Protection, the member concerned MUST IMMEDIATELY notify his/her commanding officer/supervisory head.

As can be seen from the plain language of the Patrol Guide, all that the member need have is knowledge. The Patrol Guide does not concern itself with the proper or improper service of the order of protection the duty to report is triggered by simple awareness of the existence of an order of protection. Of course proper service of an order of protection would constitute legal knowledge of the existence of the order whether or not there was actual knowledge, which would also trigger a duty to notify.

Consequently this Court must determine whether there was legal and/or actual knowledge of the existence of the order of protection in this case.

There is no question that the effort to serve the order of protection occurred while the Zamoras, parents of Andrea, were delivering the children for a visit with the Respondent. This occurred at the Respondent's mother's house.

Both Francy and Jorge Zamora acknowledged that they served the order in a closed envelope. But they also testified that the Respondent opened the envelope, looked at the papers and remarked that they could not properly serve him. This would have sufficed to provide the Respondent actual notice and knowledge that he was being served with process. On the other hand, the Respondent denied opening the envelope and denied knowing that it contained an order of protection. Everyone agreed that the Respondent's

mother grabbed the envelope and tossed it into the Zamoras' car. No evidence suggested that the Zamoras told the Respondent that the envelope contained legal process or more specifically, an order of protection.

The Department has argued that the act of throwing the papers established that the Respondent (and his mother) knew that the contents were an order of protection. The Department further argued that the words used by the Respondent were so specific that they could only have been directed at what he believed was the improper service of such an order.

The Respondent claimed that after the envelope was thrown by his mother he told the Zamoras that any communication had to be done through their respective attorneys. Further he indicated that he did not know what the contents of the envelope were and that it could have been something about child care or custody.

The problem in this case is that both sets of testimony are, more or less, equally credible. The act of throwing the envelope could as easily have been prompted by the act of the Zamoras in handing something to the Respondent while he was holding his young children as part his taking them into his care pursuant to a visitation agreement. The words spoken could have been misunderstood or misremembered. Even so, for the Respondent to have known that the plain white envelope contained legal process would have required that the Zamoras communicate that fact to him, something absent from the record.

Service of process in an envelope without more is ineffective, Bertha G. v. Paul T., 133 Misc. 2d, 509 N.Y.S.2d 995 (Kings Co. Fam. Ct. 1986). While invalidating service the court in that case noted:

The petitioner may believe that she did nothing wrong by using an envelope, especially since there was nothing in the instructions from the clerk's office that said she could not. However, her judgment in letting respondent reject the process without warning him of the consequences was questionable.⁶

The Department has the burden of proof and this Court finds that it has not established to a preponderance of the evidence that the Respondent knew that the Zamoras were attempting to serve him with an order of protection.

Additionally, because the Department has not established that the Respondent opened the envelope, it has not established that the papers were properly served.

There is thus insufficient evidence to establish that the Respondent had either actual or legal knowledge of the order of protection at that time. The Respondent is found Not Guilty of Specification No. 3.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Department on July 1, 2002. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent has been found guilty of one specification involving his being unfit for duty. The Respondent admitted to being so intoxicated that he mistook the ladies room for the men's room in spite of the fact that ladies room was well marked and the men's room was opposite side of the location they were in. He claimed to have only

⁶ Court Exhibit 3 is printed from the New York City Family Court website giving information to the petitioner on how to serve the petition and temporary order of protection. It too fails to provide detailed instructions on how service is to be accomplished.

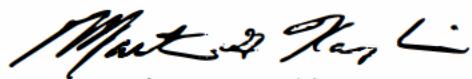
had three drinks over the course of many hours at the party. It would appear that the Respondent lacks insight into the issue of intoxication.

The Respondent has also been found guilty of engaging in a physical altercation with his then-wife Andrea Zamora. She also claimed that alcohol abuse was a factor in that misconduct.

For this reason, a period of dismissal probation is appropriate to insure that the Respondent knows and understands the consequences of alcohol abuse.

It is, therefore, recommended that the Respondent be DISMISSED from the New York City Police Department, but that the penalty of dismissal be held in abeyance for a period of one year pursuant to section 14-115 (d) of the Administrative Code, during which time he remains on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. It is further recommended that the Respondent be required to forfeit the 30 days he previously served on suspension regarding this matter.

Respectfully submitted,



Martin G. Karopkin
Deputy Commissioner – Trials



POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner – Trials

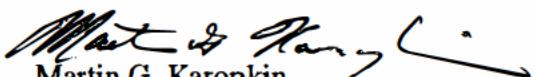
To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER CHRISTIAN FALCONI
TAX REGISTRY NO. 930121
DISCIPLINARY CASE NOS. 83892/08 & 84325/08

In 2008 and 2009, the Respondent received an overall rating of 3.5 "Highly Competent/Competent" on his annual performance evaluation. In 2007, he received a rating of 3.0 "Competent." He has been awarded two medals for Excellent Police Duty and two medals for Meritorious Police Duty. In his eight years of service, the Respondent [REDACTED]

[REDACTED] In 2008, he was placed on Level-II Discipline Monitoring. He has no prior formal disciplinary record.

For your consideration.



Martin G. Karopkin
Deputy Commissioner – Trials